IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.8018 OF 2005
WITH
CIVIL APPLICATION NO.942 OF 2006

The State of Maharashtra & Ors. ...Petitioners.
Vs.
Shri Sham Vishnupant Gurjar. ...Respondent.

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Mr. A.A. Kumbhakoni, Associate Advocate General with Mr. V.P. Malvankar, AGP for the Petitioners.
Mr. Ajay A. Joshi for the Respondent.

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CORAM : KSHITIJ R. VYAS, C.J. &
DR.D.Y.CHANDRACHUD, J.

March 28, 2006.

P.C. (Per Dr. D.Y. Chandrachud, J.):

Rule has been granted in the Writ Petition on 24th November 2005. The Respondent moved a Contempt Petition before the Maharashtra Administrative Tribunal (Contempt Petition 32 of 2005). Thereupon, a Civil Application for stay of the order of the Tribunal dated 2nd December 2004, which has been impugned in the main petition, has been instituted by the State on 16th March 2006. At this stage, we were of the view that it would be appropriate to take up the petition for hearing and final disposal and accordingly, both the Associate Advocate General and Counsel for the Respondent were agreed that the petition can be

taken up. Hence, with the consent of Counsel, the petition is taken up for final disposal.

2. The Respondent was appointed on 14th September 1984 on a temporary basis as a Vice Principal in an Industrial Training Institute, a position which falls in the M. E. S. Class II services. The post was earmarked for selection by the Maharashtra Public Service Commission. Pending such a selection, the initial appointment of the Respondent was hence on a temporary basis. The services of the Respondent came to be terminated on 6th January 1990. The Respondent challenged the order of termination before the Court in Writ Petition 359 of 1990 and the order of termination was stayed. The petition before this Court came to be transferred to the Tribunal. In the meantime, the Respondent was selected by the Maharashtra Public Service Commission to the post of Principal and he came to be appointed by an order dated 29th September 1992. When the Original Application came up for final hearing before the Tribunal, it was contended on behalf of the Respondent that he sought regularisation with effect from the initial date of appointment. The Tribunal left it open to the Respondent to submit a representation

before the Government to pray for appropriate relief in respect of service prior to his regular appointment on 29th September 1992. After considering the representation that was moved by the Respondent, Government in the Higher and Technical Education Department issued a GR dated 28th April 2003 by which the technical breaks during the period of temporary appointment came to be condoned and the period prior to the regular selection of the Respondent by the Maharashtra Public Service Commission was allowed to be counted only for the purposes of pension. The Respondent then moved the Tribunal once again in Original Application 929 of 2003 praying that his services on a temporary basis prior to the regular appointment should be reckoned for all purposes including seniority and that accordingly consequential service benefits such as increments and pay protection should be allowed.

3. The Tribunal allowed the application on 2nd December 2004 and the State Government was directed to extend benefits in terms of a GR dated 24th December 2002. However, the claim for counting past service for seniority came to be rejected. In its order which is impugned in these proceedings, the Tribunal has

noted that its attention was drawn to a decision of a Bench of the Tribunal at Aurangabad in Original Application 410 of 2002 which related to an applicant who was initially selected on an ad-hoc basis to the Maharashtra Education Services Class II in 1984 prior to his regular selection by the Maharashtra Public Service Commission in September 1992. The Tribunal held there that the case was squarely covered by a GR dated 26th May 2002 of the Government in the Higher and Technical Education Department and accordingly, the Tribunal granted annual increments and protection of pay in terms of the said GR. In the present case, it was contended before the Tribunal that the governing GR dated 28th April 2003 was not brought to the notice of the Tribunal in the earlier case and that Government had taken a policy decision to restrict the benefits of past service only for the purposes of pension. The Tribunal, however, held that since other candidates have been extended the benefits of the GR dated 24th May 2002, the same relief should be granted to the Respondent.

4. Now, admittedly in the present case, in pursuance of the earlier decision of the Tribunal dated 21st January 1997 in Transfer Application 1011 of 1991, Government issued a GR dated 28th April

2003 by which the technical break, if any, during the period of temporary appointment has been condoned and the benefit of past service has been extended to the Petitioners only for the purposes of the grant of pensionary benefits. The Learned AGP has relied upon a judgment of the Supreme Court in **State of Bihar vs. Kameshwar Prasad Singh,** (2000) 9 SCC 94, in which the Supreme Court reiterated the law enunciated in the earlier decision in **Direct Recruit Class II Engg. Officers' Assn. Vs. State of Maharashtra,** (1990) 2 SCC 715. The Supreme Court has, inter alia, held as follows :

> "(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.
>
> The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such post cannot be taken into account for considering the seniority.
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> -(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

5. According to the State, since the earlier appointment of

the Respondent, prior to his regular selection in 1992, was a temporary appointment, pending regular selection by the MPSC that period cannot count for pay, seniority and other benefits. However, a policy decision has been taken to protect the Respondent in regard to pensionary benefits. Hence, the State relies on Principle 'A' enunciated in **Kameshwar Prasad Singh's** case.

6. In our view, the ends of justice would be met if the Tribunal is directed to reconsider the application having regard to the settled principles of law enunciated inter alia in the aforesaid decision. The Tribunal followed the earlier GR dated 24th May 2002 upon which relief had been granted in O.A. 410 of 2002 by the Aurangabad Bench. As we have already noted, by a GR dated 28th April 2003, a policy decision has been taken by the State Government to count the past service of the Respondent prior to his regular selection on 29th September 1992 only for the purposes of pensionary benefits. It will be fair to allow the Respondent if he is so advised, to challenge the validity of the Government Resolution dated 28th April 2003 to the extent to which the said GR restricted the grants of benefits of past service only to the extent of

pensionary benefits. We accordingly grant liberty to the Respondent to do so before the Tribunal. Hence, in order to facilitate a fresh determination by the Tribunal, we quash and set aside the Judgment and Order that is impugned in these proceedings. The Original Application filed by the Respondent (O.A. 929/03) shall accordingly stand restored to the file of the Tribunal for fresh determination. The Petition shall stand disposed of in these terms. There shall be no order as to costs.

7. In view of the disposal of the Petition, the Civil Application does not survive and is accordingly disposed of.

CHIEF JUSTICE

Dr.D. Y. Chandrachud, J.